

STATE OF MICHIGAN
COURT OF APPEALS

DAVID J. MICHAEL and LAURA MICHAEL,¹

Plaintiffs-Appellees,

v

AUTOMOBILE CLUB OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 260057
Wayne Circuit Court
LC No. 03-325291-CL

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant Automobile Club of Michigan appeals by leave granted the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff David Michael's claim of retaliatory discharge under the Michigan Whistleblowers' Protection Act (WPA).² We affirm.

I. Factual Background

Plaintiff was employed by defendant from July of 1990, until his termination on March 14, 2003. His supervisor was Robert Gordon. During the summer of 2002, plaintiff was assigned to manage the Courtesy Patrol Program, a State of Michigan project funded by federal dollars that assisted stranded motorists along the highway. Defendant entered into a contract with the state to manage the Courtesy Patrol Program in-house. The contract provided for reimbursement of defendant's expenses by the state. Plaintiff and Mr. Gordon had control of the program's budget. As defendant conducted other programs from the same facility as the Courtesy Patrol, the state agreed to reimburse defendant for eighty percent of the building expenses.

Plaintiff's job responsibilities also included being an authorized signer of checks of \$1,000 or less. On February 14, 2003, Robert Kaczor, Mr. Gordon's supervisor, discovered that

¹ As Laura Michael's claim is derivative in nature, we will refer to David Michael as the singular plaintiff.

² MCL 15.361 *et seq.*

a temporary employee, Marcia Manuel, embezzled \$500,000 from the company while under plaintiff's supervision. Upon Ms. Manuel's suggestion, and with the approval of Mr. Gordon, plaintiff had delegated to Ms. Manuel the responsibility of verifying the accuracy of check requests against a computer database. As a result of this freedom, Ms. Manuel was able to submit falsified invoices for payment.³

Plaintiff was suspended on March 10, 2003, and subsequently terminated on March 14, 2003.⁴ According to defendant, plaintiff was terminated because of his role leading to the embezzlement. According to plaintiff, however, he was terminated because he threatened to inform James Schultz, an official with the Michigan Department of Transportation, that it was being overcharged for defendant's management of the Courtesy Patrol Program. Plaintiff testified at his deposition that he informed Mr. Kaczor on February 12, 2003, of his concerns regarding overcharges to the state for its portion of the building expenses. Plaintiff alleged that he offered to pursue the matter with the accounting department, but Mr. Kaczor became angry about this intrusion. In response, plaintiff threatened to contact the state. Plaintiff also threatened to inform the state it was being overcharged, as defendant parked the Courtesy Patrol vans outside while keeping its own vehicles in the garage without crediting the state for this use of the space. Mr. Kaczor again became angry with plaintiff during this discussion. On the day that he was suspended, plaintiff refused to comply with Mr. Kaczor's order to have DSL lines installed for the exclusive use of defendant's programs, with the state bearing eighty percent of the cost. Once again, he threatened to inform the state of the overcharges and was later called to Mr. Kaczor's office where he was suspended.

II. WPA Claim

Defendant challenges the trial court's denial of its motion for summary disposition on two grounds: (1) Mr. Bower, who actually terminated plaintiff, was unaware of plaintiff's threats and, therefore, defendant claims that there was no causal connection between the threats and his termination; and (2) the conduct that plaintiff threatened to report involved a breach of contract which is not protected by the WPA. We review a trial court's determination regarding a motion for summary disposition de novo.⁵ A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.⁶ "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court is to consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party

³ Plaintiff signed \$68,000 of fraudulently requested checks. Mr. Gordon also signed a significant number of these checks.

⁴ As will be discussed in further detail later, plaintiff was informed of his suspension and ultimate termination by Mr. Kaczor. However, it appears that defendant's CEO, Douglas Bower, was involved in making these decisions as well.

⁵ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

⁶ *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

to decide whether a genuine issue of material fact exists.”⁷ Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.⁸

We also review whether a plaintiff has presented a prima facie case under the WPA de novo.⁹ Section 2 of the WPA provides, in relevant part:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body^[10]

To establish a prima facie case under the WPA, a plaintiff must prove that: (1) he or she was engaged in a “protected activity” as defined by the WPA; (2) he or she was terminated or suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action.¹¹ “Protected activity” under the WPA includes reporting a violation or suspected violation of a law or regulation to a public body or being about to make such a report.¹²

We disagree with defendant’s contention that plaintiff was not engaged in protected activity under the WPA. Plaintiff alleged that he was terminated, as he threatened to inform the state that it was being overcharged for building expenses in relation to the Courtesy Patrol Program based on the percentage of space and resources used by defendant’s own programs, and was prepared to report it. Plaintiff “suspected” that his employer was committing a fraud upon the state in violation of MCL 600.6470¹³ and MCL 750.280.¹⁴ Defendant may have merely

⁷ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

⁸ *MacDonald*, *supra* at 332.

⁹ *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

¹⁰ MCL 15.362.

¹¹ *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

¹² MCL 15.362; *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998); *Trepanier v Na’l Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002).

¹³ MCL 600.6470 provides:

Any person who corruptly practices, or attempts to practice, any fraud against the state of Michigan, in the proof, statement, establishment, or allowance of any claim or of any part of a claim, against the state, shall thereby forfeit the same to the state and it shall be the duty of the court of claims in such case to find specifically that such fraud was practiced, or attempted to be practiced, and

(continued...)

breached its contract with the state by allegedly overcharging the state for the use of its facilities. However, a reasonable trier of fact could determine from the evidence that plaintiff suspected that defendant's agents intended to illegally defraud the state by its actions.¹⁵

Furthermore, plaintiff created a factual issue regarding whether his protected activity was the cause of his termination. Plaintiff voiced his concerns and threatened to contact the state only in the presence of Mr. Kaczor. Mr. Kaczor placed plaintiff on suspension and also notified plaintiff that his employment had been terminated. Defendant presented evidence that Mr. Bower made the decision to terminate plaintiff and was unaware of plaintiff's threats. However, Mr. Kaczor testified at his deposition that he fully apprised Mr. Bower of the situation and that he participated with Mr. Bower in making this decision. Mr. Kaczor further testified that he was solely responsible for preparing plaintiff's termination letter. Therefore, the trier of fact could determine that Mr. Kaczor informed Mr. Bower of the threats, or that plaintiff's threats affected Mr. Kaczor's participation in making this employment decision. Accordingly, the trial court properly denied defendant's motion for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jessica R. Cooper

/s/ Kirsten Frank Kelly

(...continued)

thereupon to give judgment that such claim is forfeited to the state and that the claimant be forever barred from prosecuting the same.

¹⁴ MCL 750.280 provides, in relevant part, that "Any person who shall be convicted of any gross fraud or cheat at common law, shall be guilty of a felony"

¹⁵ We also note that "the reporting of misconduct in an agency receiving public money is in the public interest." *Phinney v Perlmutter*, 222 Mich App 513, 554; 564 NW2d 532 (1997).